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Nos. 06-340, 06-549

In The
Supreme Court of the United States

NATIONAL ASSOCIATION OF HOME BUILDERS, *et al.*,

Petitioners,

v.

DEFENDERS OF WILDLIFE, *et al.*,

Respondents.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Petitioner,

v.

DEFENDERS OF WILDLIFE, *et al.*,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR RESPONDENTS DEFENDERS OF WILDLIFE, *ET AL.*

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that EPA's decision to transfer permitting authority to Arizona under Section 402(b) of the Clean Water Act was arbitrary and capricious because it was based on inconsistent interpretations of Section 7(a)(2) of the Endangered Species Act; and, if so, whether the court of appeals should have remanded to EPA for further proceedings without ruling on the interpretation of Section 7(a)(2).

2. Whether EPA may raise in this Court a rationale for avoiding compliance with Section 7(a)(2) of the Endangered Species Act, 16 U.S.C. § 1536(a)(2), that EPA not only failed to rely on during the administrative proceedings and before the Ninth Circuit issued its ruling, but which the agency expressly disavowed in the administrative proceedings and advised the court of appeals panel it was not raising.

3. Whether EPA must comply with Section 7(a)(2) of the Endangered Species Act when EPA authorizes States to administer the Clean Water Act permitting program, where Section 7(a)(2)'s requirements apply to "any action authorized, funded, or carried out" by a federal agency, 16 U.S.C. § 1536(a)(2), and this Court has already construed this language as "admit[ting] of no exception." *TVA v. Hill*, 437 U.S. 153, 173 (1978).

CORPORATE DISCLOSURE STATEMENT

The Corporate Disclosure Statement in respondents' Brief in Opposition to Petitions for a Writ of Certiorari remains valid.

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STATEMENT

This case concerns the United States Environmental Protection Agency's ("EPA's") "final action authorizing Arizona to implement the NPDES [National Pollutant Discharge Elimination System] program," 67 Fed. Reg. 79,629, 79,631 (Dec. 30, 2002), and whether, in taking that action, EPA failed to comply with its duties under the Endangered Species Act, 16 U.S.C. § 1531 *et seq.* ("ESA"). Section 7(a)(2) of the ESA provides that "[e]ach federal agency *shall*, in consultation with and with the assistance of the Secretary [of the Interior], *insure that any action authorized, funded, or carried out* by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction" of the "critical" habitat of a listed species. 16 U.S.C. § 1536(a)(2) (emphasis added).

The plain terms of section 7(a)(2) therefore apply to EPA's action and, indeed, this Court has already ruled that the "language [of section 7] admits of no exception." *TVA v. Hill*, 437 U.S. 153, 173 (1978). Nonetheless, EPA and the National Association of Home Builders ("NAHB") contend that section 7(a)(2) "does not apply" to EPA's decisions on whether to transfer NPDES authority regardless of whether such transfers will lead to the extinction of federally protected species. EPA Br. at 42. This position is not only impossible to reconcile with the language and purpose of section 7(a)(2), but it also conflicts with (1) EPA's statements in the decision documents under review, (2) EPA's position in the court of appeals, and (3) additional published statements of agency policy adopted following public notice and comment proceedings.

According to petitioners, however, the Court should overlook EPA's conceded "confusion" and "misstatements of law" in the record, EPA Br. at 42, 45, 46, and instead "defer" to EPA's extra-record *post hoc* "clarification" that compliance with the ESA is never "required in this context." *Id.* at 38, 49. To endorse that position the Court would be compelled to discard fundamental principles of administrative law and judicial review, contort the language of the ESA beyond recognition, and ignore the Court's own ruling and reasoning in *Hill*. Rather, the case should be remanded to EPA for further administrative proceedings so that EPA may "clarify" its position based on a full administrative record, including important factual and legal considerations unaddressed in the extra-record explanation on which EPA asks the Court to rely.

To place these issues in legal and factual context, respondents will first summarize the "complementary" wildlife protection provisions of the two environmental statutes at issue, NAHB App. 274, and then describe EPA's shifting positions on compliance with section 7(a)(2).

A. Section 7 Of The Endangered Species Act

When Congress enacted the ESA in 1973, its "plain intent . . . was to halt and reverse the trend towards species extinction, whatever the cost." *Hill*, 437 U.S. at 184. The House Report relied on in *Hill* explained that "[f]rom all evidence available to us, it appears that the pace of disappearance of species is accelerating" and that

> [f]rom the most narrow possible point of view, it is in the best interests of mankind to minimize the loss of genetic variations. The reason is simple: they are potential resources. They are keys

> to puzzles which we cannot solve, and may provide answers to questions which we have not yet learned to ask . . . Who knows, or can say, what potential cures for cancer or other scourges, present or future, may lie locked up in the structures of plants which may yet to be [] discovered . . . Sheer self-interest impels us to be cautious.

H.R. Rep. No. 93-412, 93d Cong., 1st Sess. (1973) ("1973 House Report"), *reprinted in* A Legislative History of the Endangered Species Act of 1973, As Amended in 1976, 1978, 1979, and 1980, at 144 (1982) (hereafter "ESA Leg. Hist.").

Congress determined that the "principal" threats to species are "pollution, destruction of habitat and the pressures of trade" and that strong federal legislation was essential because "protection of endangered species is not a matter that can be handled in the absence of coherent national and international policies. . . ." 1973 House Report, ESA Leg. Hist. at 141, 146. Congress therefore passed "'the most comprehensive legislation for the preservation of endangered species ever enacted by any nation.'" *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 698 (1995) (quoting *Hill*, 437 U.S. at 180). The ESA "finds" that "species of fish, wildlife, and plants . . . in danger of or threatened with extinction" are of "[a]esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people," and the Act's "purpose" is to provide a "program for the conservation" of such species, which means recovering them until the "measures provided pursuant to [this Act] are no longer necessary." 16 U.S.C. §§ 1531(a), (b); *id.* at § 1532(3).

The statute's "broad purpose," *Sweet Home*, 515 U.S. at 698, is reflected in section 7, which "provides a particularly good gauge of congressional intent." *Hill*, 437 U.S. at 181.

In *Hill*, the Court held that section 7's "very words affirmatively command all federal agencies 'to *insure* that actions *authorized, funded, or carried out* by them do not *jeopardize* the continued existence' of an endangered species or '*result* in the destruction or modification of habitat of such species.'" *id.* at 173 (emphasis in original; internal citation omitted). The Court construed this language as flatly "'*prohibit[ing]* [a] federal agency from taking action which does jeopardize the status of endangered species.'" *Id.* at 179 (emphasis in original; internal quotation omitted).

In 1978, Congress ratified *Hill*'s plain language reading of section 7 and established a new mechanism for addressing unavoidable "conflicts" between the "primary missions" of federal agencies and the prohibition in section 7 on agency actions that jeopardize species and destroy critical habitat. H.R. Rep. No. 95-1625, 95th Cong., 2d Sess. (1978) ("1978 House Report"), ESA Leg. Hist. at 734, 737. While finding that the "consultation process" required by section 7 "can resolve many if not most of the conflicts that might develop under the Act," the relevant Congressional committees recognized that "there will continue to be some Federally authorized activities that *cannot be modified* in a manner which will avoid a conflict with a listed species." *Id.* at 737 (emphasis added). Accordingly, to address "those cases where a Federal action cannot be completed . . . without directly conflicting with the requirements of Section 7," *id.*, the 1978 amendments created a "process by which actions authorized, funded, or carried out by Federal agencies could be exempted from the provisions of the Act." S. Rep. No. 97-418, 97th Cong., 2d Sess. (1982) ("1982 Senate Report"), *reprinted in* NAHB App. 531.

Under Fish and Wildlife Service ("FWS" or "Service") regulations, each "action agency" triggers the section 7

process by determining if its action "may affect" a listed species or critical habitat; if so, the agency must conduct "formal consultation" with FWS, unless the Service concurs that the action is unlikely to "adversely affect" the species. 50 C.F.R. § 402.14(a), (b). The formal consultation process culminates in a "Biological Opinion" that "[e]valuate[s] the effects of the action," and determines whether it is "likely to jeopardize" any listed species or impair critical habitat. *Id.* at §§ 402.14(g)(3), (4); *see also Bennett v. Spear*, 520 U.S. 154, 158 (1997). This analysis must include all "direct," "cumulative," and "indirect effects," which are those "caused by the proposed action and are later in time, but still are reasonably certain to occur." 50 C.F.R. § 402.02. The agency must then determine "whether and in what manner to proceed," *id.* at § 402.15(a), to ensure that the "action" does not "jeopardize" any listed species or "result in" the destruction or "adverse modification" of "critical" habitat. 16 U.S.C. § 1536(a)(2).

For example, if the FWS finds that the action will "result in" destruction of critical habitat, the action agency must determine whether to adopt any "reasonable and prudent alternatives" proposed by the Service to avoid that result. 16 U.S.C. § 1536(b)(3)(A). If there are no such "alternatives" within the agency's statutory authority, the recourse for the agency or other affected parties is to seek an exemption from the Endangered Species Committee. *Id.* at § 1536(h)(1)(A)(I).

Pursuant to the exemption process, any federal agency, "permit or license applicant," or the "Governor of the State in which an agency action will occur," may "apply . . . for an exemption" if FWS determines, after consultation, that the "agency action would violate" section 7(a)(2) but the Service and agency are unable to develop a

"reasonable and prudent alternative" the agency can implement to avoid that result. 16 U.S.C. §§ 1536(g)(1), (3). The ultimate decision to grant such an exemption is vested in an "Endangered Species Committee" composed of high-ranking federal officials, including the Administrator of EPA, and one representative from "each affected State." *Id.* at §§ 1536(e)(1), (3). If the Committee grants an exemption, it also "establish[es]" measures "to minimize the adverse effects of the agency action" on endangered species regardless of whether the agency has authority to implement such measures under its own statute. *Id.* at § 1536(h)(1)(B).[1]

B. Pertinent Provisions Of The CWA

The "broad purpose" of the Clean Water Act ("CWA") is "'to restore and maintain the chemical, physical, and *biological integrity* of the Nation's waters.'" *Arkansas v. Oklahoma*, 503 U.S. 91, 105-06 (1992) (quoting 33 U.S.C. § 1251(a)) (emphasis added). Accordingly, the CWA, enacted in 1972, establishes a "national goal" of achieving "water quality which provides for the protection and propagation of fish, shellfish, and wildlife. . . ." 33 U.S.C. § 1251(a)(2).[2]

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[1] Because of its extraordinary power to authorize a federal action that may result in the extinction of a species, the Committee is "euphemistically known as the 'God' committee." Kilbourne, *The Endangered Species Act Under the Microscope: A Closeup Look From a Litigator's Perspective*, 21 Envt'l L. 499, 560-61 (1991).

[2] *See also* H.R. Rep. No. 92-911, 92d Cong., 2d Sess. 76 (1972) (The CWA's "objective" is the "restoration and maintenance of the chemical, physical, and biological integrity of the Nation's waters . . . The word 'integrity' . . . refers to a condition in which the natural structure and function of ecosystems is maintained.").

The CWA "anticipates a partnership between the States and the Federal Government" and "provides for two sets of water quality measures." *Arkansas*, 503 U.S. at 101 (internal citation omitted). First, the CWA requires EPA to issue technology-based "[e]ffluent limitations," 33 U.S.C. § 1311, including limitations needed to "assure . . . protection and propagation of a balanced population of shellfish, fish, and wildlife." *Id.* at § 1312(a). Second, the States and EPA jointly develop "[w]ater quality standards" so that pollution sources "may be further regulated to prevent water quality from falling below acceptable levels." *EPA v. California ex rel. State Water Resources Control Bd.*, 426 U.S. 200, 205 n.12 (1976). These standards must also "tak[e] into consideration the[] use and value" of navigable waters for the "propagation of fish and wildlife." 33 U.S.C. § 1313(c)(2)(A).

States must submit proposed water quality standards for review by EPA, and if the "State fails to comply with [EPA's] recommendation, the Act authorizes the EPA to promulgate water quality standards for the State." *Arkansas*, 503 U.S. at 101. Hence, the States and, if necessary, EPA establish water quality standards that provide "for the protection and propagation of fish, shellfish, and wildlife." 40 C.F.R. § 131.2.

The NPDES program is the "primary means for enforcing these limitations and standards," *Arkansas*, 503 U.S. at 101, because the CWA prohibits point sources from discharging pollutants into navigable waters without a permit. *See* 33 U.S.C. § 1311(a). Section 402 of the Act, 33 U.S.C. § 1342, "establishes the NPDES permitting regime, and describes two types of permitting systems: state permit programs that must satisfy federal requirements and be approved by the EPA, and a federal program

administered by the EPA." *Arkansas*, 503 U.S. at 105. Thus, the States play an important role in implementing the program, but "Congress has vested in [EPA] broad discretion to establish conditions for NPDES permits," and "[s]imilarly, Congress preserved for [EPA] *broad authority to oversee state permit programs*[.]" *Id.* (emphasis added).

Consistent with EPA's "broad authority" over the program, it is *not* the case that Congress imposed a ministerial duty on EPA to transfer permitting authority to the States. To the contrary, while section 402(b)(1) provides that EPA "shall approve" the transfer of permitting authority when EPA finds that a State has met nine criteria, EPA can and does employ considerable discretion – or, in the government's words, an "exercise of judgment," EPA Br. at 17 – in assessing and applying those criteria, which range from the specific to the very general. Of particular relevance here, several of the statutory factors as to which EPA exercises "judgment" encompass the wildlife-related concerns that are manifested throughout the CWA scheme.

For example, one general criterion is whether the State has "adequate authority" to "apply, and insure compliance with" multiple provisions of the CWA. 33 U.S.C. § 1342(b)(1)(A). In turn, one of those provisions concerns any "effluent limitations" established for the "protection and propagation of a balanced population of shellfish, fish and wildlife. . . ." *Id.* at § 1312(a). Another requires that all permits satisfy "any applicable water quality standard[s]," *id.* at § 1311(b)(1)(C), including those that protect the "use and value" of navigable water bodies "for . . . propagation of fish and wildlife." *Id.* at § 1313(c)(2)(A). Through these and other transfer criteria, therefore, EPA has the responsibility under the CWA to evaluate the adequacy of a State's program to provide for

the "protection and propagation of fish, shellfish, and wildlife." If EPA "determines" that a State's program is not "adequate" in that or any other respect, it denies the transfer. *Id.* at § 1342(b).[3]

Even after EPA authorizes a State to administer the NPDES program, "Congress intended to grant the [EPA] discretion in [its] oversight of the issuance of NPDES permits." *Arkansas*, 503 U.S. at 106; *see also* NAHB App. 97. The State must advise EPA of each permit it "propose[s]" to issue, 33 U.S.C. § 1342(d)(1), and EPA may "object" to any permit. *Id.* at § 1342(d)(2); *see also* 40 C.F.R. § 123.44(c). The State must then either address EPA's concerns or authority over the permit reverts to EPA. 33 U.S.C. § 1342(d)(4). In addition, the State must enter into a Memorandum of Agreement with EPA that is "consistent with EPA's statutory oversight responsibility" and "include[s] other terms, conditions, or agreements" deemed "relevant to the administration and enforcement of the State's regulatory program." 40 C.F.R. § 123.24(a). States must also provide draft permits to the FWS and all other "Federal and State agencies with jurisdiction over fish, shellfish, and wildlife resources. . . ." *Id.* at § 124.10(c)(iii).

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[3] That EPA in fact exercises considerable discretion in determining whether, and on what terms, to delegate NPDES authority to a State is also reflected in EPA's solicitation and consideration of public comments on a State's application to administer the NPDES program. *See* 40 C.F.R. § 123.61(b); *see also* Joint Appendix ("J.A.") at 194-256 (addressing public comments on Arizona's application).

C. EPA's Past Successful Compliance With Section 7(a)(2) And The CWA In Making NPDES Transfer Decisions

EPA's new position that it is impossible to comply with both section 7(a)(2) of the ESA and section 402(b)(1) of the CWA is directly at odds with EPA's and FWS's past declarations and actions. In public notice and comment proceedings, EPA has repeatedly determined that it *must* comply with section 7(a)(2) in making transfer decisions, and the agencies have *successfully* used the section 7(a)(2) consultation process to evaluate and mitigate the potential adverse effects of such decisions on federally listed species.

With regard to Florida's application, for example, the federal agencies, together with the State, agreed to a process "for close coordination between EPA, the State, and the Service[] to ensure that the state-issued permits are not likely to jeopardize the continued existence of Federally listed species." 60 Fed. Reg. 25,718, 25,719 (May 12, 1995). In connection with Oklahoma's application, EPA and FWS complied with section 7(a)(2) and agreed, along with the State, that FWS would have an opportunity to "confer on permits which are likely to affect federally listed species." 61 Fed. Reg. 65,047, 65,053 (Dec. 10, 1996). In response to comments, EPA declared that "consultation conducted on the authorization of a state NPDES program is consistent with the intent, definitions and the requirements of the ESA and CWA," and that "[t]he approval of a state program under section 402 of the CWA is a federal authorization and not simply a review of the state's documents. EPA views the approval as 'discretionary.'" *Id.* at 65,051.

Likewise, before EPA granted Texas's application, FWS issued a Biological Opinion that found that the

State's water quality "standards require that permits be written in such a manner that would avoid jeopardy to aquatic and aquatic dependent wildlife (including listed species). . . ." 63 Fed. Reg. 51,164, 51,196 (Sept. 24, 1998). EPA and FWS also "developed procedures for ensuring the protection of endangered and threatened species" following the transfer of authority, including by "facilitat[ing] coordination among the federal agencies and timely communication of information and recommendations to the State." *Id.* at 51,198. In response to public comments, EPA again stated that "section 7 does apply to its action. . . ." *Id.*

In 2001, after again soliciting public comment, EPA and FWS jointly published in the Federal Register a "Memorandum of Agreement" that "address[ed] interagency coordination under" the CWA and ESA, NAHB App. 245, and "ensure[d] that EPA actions meet the substantive requirements of section 7(a)(2). . . ." *Id.* at 253. Emphasizing that the "ESA requires the involvement of all Federal agencies in the protection and recovery of our Nation's unique biological resources," *id.* at 274, the agencies confirmed that "EPA's current practice is to consult with the Services where EPA determines that approval of a State's or Tribe's application to administer the NPDES program may affect federally listed species." *Id.* at 260.[4]

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[4] EPA's compliance with section 7(a)(2) was consistent with positions it took in cases brought by industry groups in the Fifth and Tenth Circuits. EPA argued that consultation with FWS is necessary to "satisfy EPA's obligations under ESA section 7(a)(2)," and that the contrary position is a "myopic approach [that] ignores the plain language of ESA section 7(a)(2), the Supreme Court's expansive reading of agency action in section 7, the broad regulatory definition of 'action'

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D. EPA's Internally Inconsistent Approach To Section 7(a)(2) When Considering Arizona's Application

As the government acknowledges, the administrative record reflects EPA's "confusion," to say the least, concerning its section 7(a)(2) obligations in reviewing Arizona's transfer application. EPA Br. at 42. In fact, not only was EPA's position internally inconsistent, but there were serious conflicts between EPA and FWS officials who believed that without appropriate safeguards the transfer could lead to the extinction of federally protected species.

1. In 2002, Arizona "submitted a request for [EPA's] approval" to regulate "most discharges of pollutants subject to the federal NPDES program," including "storm water point source discharges," "industrial wastewater," and "discharges from federal facilities." NAHB App. 543,

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and 'effects of the action' in the ESA implementing regulations, and EPA's role in approving state applications." Brief for the Respondents at 29, 30, *American Forest & Paper Ass'n v. EPA*, No. 96-60874 (5th Cir. 1997) (hereafter "EPA 5th Cir. Br.") (reproduced in Addendum to Respondents' Court of Appeals' Reply Brief).

Neither the Fifth nor Tenth Circuits disagreed with EPA's position that section 7 compliance is mandatory. The Tenth Circuit did not reach the merits. The Fifth Circuit suggested that section 7(a)(2) *does* "require[] EPA to consult with FWS" before making an NPDES transfer decision, *American Forest & Paper Ass'n v. EPA*, 137 F.3d 291, 298 (5th Cir. 1998), but ruled against EPA on the narrower ground that EPA could not "require" the State to consult with federal agencies regarding the impact of state-issued permits on endangered species. *Id.* at 297. EPA subsequently explained to the public that it "believes that this case was wrongly decided," 64 Fed. Reg. 2,742, 2,746 (Jan. 15, 1999), but EPA nonetheless complied with it by devising, along with FWS, species safeguards that did not impose any consultation duties directly on States. *See, e.g.*, 63 Fed. Reg. 51,164, 51,198 ("EPA and the Services have developed procedures for ensuring the protection" of species that "do not impose obligations, procedural or otherwise, on the State").

550. Arizona also requested that the federal government *fund* much of its program. *Id.* at 567; J.A. 44.

When soliciting public comments, EPA stated that it would "not make a final decision on [] program approval until after . . . completion of the ongoing consultations with the [FWS] on effects program approval may have on endangered or threatened species." NAHB App. 546. As before, EPA declared that

> *the ESA requires federal agencies to consult with the U.S. Fish and Wildlife Service* on the effects of federal actions on endangered species. *EPA has determined that its action on the AZPDES program application constitutes a federal action that is subject to section 7 of the ESA.* Section 7(a)(2) of the ESA places a statutory requirement (*separate and distinct from CWA section 402(b)*) for EPA to '* * * insure that any action . . . * * * is not likely to jeopardize the continued existence of any endangered species or threatened species'. . . .

Id. at 548 (emphasis added; ellipses in original).

EPA initiated section 7 consultation by providing FWS with a "Biological Evaluation" that "discuss[ed] the effects of [EPA's] approval" of the Arizona program, and acknowledged that "all Federally-listed [species] and critical habitats in, adjacent to, or dependent on all surface waters in Arizona may be affected by the action." NAHB App. 587, 614. EPA attached a list of 60 federally listed species that could be harmed by the transfer. *Id.* at 621-23.

EPA recognized that projects requiring NPDES permits may have "detrimental effect[s] on Federally-listed species and habitats" and that an immediate consequence of the transfer decision would be "a reduction in

the number of mechanisms available . . . to protect Federally-listed species," *i.e.*, "[i]n changing from a Federal permitting program to a State permitting program, the permit-related ESA Section 7 processes for consultation will no longer apply." NAHB App. 610, 615. EPA asserted, however, that various measures would adequately protect species in the absence of section 7 safeguards. *Id.* at 617.

2. If FWS had concurred with this conclusion, the consultation would have ended at that point. *See* 50 C.F.R. § 402.14(b). But FWS did not agree because its biologists concluded that, in the absence of additional safeguards, the transfer would in fact "result in significant effects to the[] survival and recovery" of various endangered species "through destruction, degradation, and fragmentation of their habitats." J.A. 54; *see also id.* at 31.

For example, Service biologists explained that FWS reviews of NPDES permits issued by EPA had been vital in protecting the Southwestern willow flycatcher, a highly endangered bird species dependent on river ecosystems in Arizona. *See* J.A. 39, 43. Because the Service's ability to provide such essential protections would be lost upon transfer of the NPDES program, Service biologists concluded that, in the absence of agreed-on protections, the transfer "could have a devastating effect" on survival of the flycatcher. *Id.* at 39. Service biologists expressed similar concerns about the fate of other animal species, such as bald eagles and certain endangered fish species.[5]

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[5] FWS biologists believed that the transfer could harm both aquatic and upland species that had in fact benefitted greatly from section 7 consultations on NPDES permits. *See, e.g.*, J.A. 41 (describing potential adverse impacts on "eagle breeding areas"); *id.* at 52 (finding that listed fish species "may be adversely affected").

FWS scientists also concluded that without additional safeguards the transfer would "appreciably reduce the conservation status" of federally protected plants because

> [g]reat strides in minimizing the disturbance of construction projects in the range of these species to provide for their survival and recovery will be diminished, if not lost . . . [T]his action is more than a shift in program authority; we will lose our section 7 nexus for consultation, and construction projects . . . *will destroy important habitat and adversely affect listed species.*

J.A. 46 (emphasis added). With regard to the Huachuca water umbel, an aquatic plant "dependent on steady water levels for habitat stability," FWS biologists determined that "[s]ection 7 consultations with EPA" on NPDES permits "have allowed for the development of conservation measures that minimize the impact of water withdrawals" in critical habitat but that, in the absence of adequate protections, the transfer of authority "could compromise the water quantity in critical habitat, *reducing the likelihood of the long-term survival and recovery*" of the species. J.A. 49 (emphasis added).[6]

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[6] Service biologists also concluded that the transfer could lead to the rapid extinction of another plant endangered by ongoing habitat destruction because, of the species' dwindling habitat that had been protected in some manner, nearly *half* had been "conserved through conservation measures gained through section 7 consultation with EPA" on NPDES permits and, "[w]ith no conservation measures in place with EPA and the State" tailored to the plant, the "species will be at risk of severe decline." J.A. 47-49. The biologists further found that no other existing federal or states measures would address adverse effects to listed plants because the ESA's general prohibition on "taking" members of a listed species does not apply to plants on private land, *see* 16 U.S.C. § 1538(a)(2)(B), and there is no Arizona statute or

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3. EPA and FWS disagreed on how these serious impacts should be addressed under section 7(a)(2). However, in contrast to the *post hoc* position EPA is now urging – *i.e.*, that compliance with section 7(a)(2) "is not required" on transfer applications under *any* circumstances, EPA Br. at 49 – the agencies' disagreement related to the *scope* of the required analysis. EPA officials maintained that, while they *were* required to comply with section 7(a)(2), the Biological Opinion should focus on analyzing adverse effects over which EPA believed it had statutory authority under the CWA, *i.e.*, adverse impacts "relating to both aquatic and upland species *if they are water quality-related.*" J.A. 143 (emphasis added).

In contrast, FWS took the position that, once consultation is initiated, the "Service must analyze all potential effects (i.e., direct, indirect, and cumulative effects)," and that the "action agency's ability to control those effects is irrelevant to the analysis." J.A. 143. FWS officials further explained that, if such an analysis yielded a "jeopardy determination" but the Service and EPA could not devise a "reasonable and prudent alternative" that would avoid extinction, EPA or Arizona could seek "an exemption via" the Endangered Species Committee process. *Id.*[7]

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regulation that forbids the destruction of federally listed plants. *See* NAHB App. 57.

[7] *See also* J.A. 148 ("The indirect effects of future permitted actions could result in a jeopardy biological opinion on EPA's approval of the assumption by Arizona."); *id.* at 140 ("EPA has backtracked on [its] commitment to consider both the direct and indirect effects . . . [T]hey will only address impacts to listed species directly related to water quality.").

4. The Biological Opinion that resulted from this interagency dispute is a hybrid of the agencies' legally incompatible positions. The Opinion reiterates EPA's and FWS's longstanding recognition that the "proposed approval" of a State permitting program *is* a federal "action" subject to section 7(a)(2), and also that the ESA and CWA are "consistent" statutory schemes. NAHB App. 82, 84. Indeed, the document stresses that:

> [t]he environmental protection goals of the CWA contain specific references to protecting 'fish,' 'shellfish,' 'wildlife,' and 'aquatic life,'; *these terms clearly encompass federally listed and proposed species.* Section 101(a) provides as its goal to 'restore and maintain the chemical, physical, and biological integrity of the Nation's waters,' 33 U.S.C. § 1251(a)(2). *This goal is consistent with the ESA's purpose of providing 'a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved.'*

NAHB App. 84 (emphasis added).

The Opinion further states that "we [FWS] have expressed concerns that the approval will result in a loss of section 7 consultation-related conservation benefits" for various species, NAHB App. 111-12, and that the "loss of conservation benefits as an indirect effect *will appreciably reduce the conservation status*" of several species. *Id.* at 112 (emphasis added); *see also id.* at 110, 111. The Opinion also suggests that these anticipated adverse effects *should* be addressed under section 7(a)(2) because *"[r]egarding causation, the FWS uses the 'but for' test.* This test means that a Federal action is the cause of an effect if . . . 'but for' the action the effect would not have occurred." NAHB App. 112 (emphasis added). Yet, while recognizing that some

listed species *would* lose "conservation benefit[s]" that had proven crucial to their survival, *id.*, and that this loss of protection would *not* occur "but for" the transfer decision, the Opinion fails to analyze whether this impact will *in fact* lead to species jeopardy or loss of critical habitat, or whether the agencies should, as in past consultations, agree on measures to prevent those impacts.

Instead, several pages after stating that FWS uses a "but for" test, the Opinion applies a very different causation rationale to *avoid* addressing those impacts, asserting that the "action, as proposed is not likely to jeopardize" affected species because the "loss of any conservation benefit is not caused by EPA's decision to approve the State of Arizona's program," but, rather, by "Congress' decision" in 1972 to enact section 402(b) of the CWA. NAHB App. 114, 116. Nonetheless, EPA's final decision "approv[ing] the application" *again* advised the public that EPA had completed the "consultation process *required* by ESA section 7(a)(2)" and that its "approval of the State program meets the *substantive* requirements of the ESA." NAHB App. 73 (emphasis added).

E. Proceedings Below

Because EPA conceded that it *was* required to comply with section 7(a)(2), respondents brought a straightforward "arbitrary and capricious" challenge to the adequacy and logical consistency of the Biological Opinion and EPA's reliance on that document. Respondents argued that, as in past consultations on transfer applications, the Opinion should at least address how endangered species will in fact be affected by the transfer and, if jeopardy or critical habitat destruction will result, either fashion a "reasonable and

prudent alternative" or refer EPA and Arizona to the Congressionally-mandated exemption process. While defending its decision, EPA repeatedly advised the court of appeals that it was *not* arguing that NPDES transfer decisions are non-discretionary actions, or that such decisions may avoid section 7(a)(2) compliance for any other reason.[8]

In ruling that EPA's reliance on the Biological Opinion was arbitrary and capricious, the court of appeals reasoned that the section 7(a)(2) obligation to avoid jeopardy is coterminous with the duty to consult – *i.e.*, both are triggered by "any action authorized, funded, or carried out by such agency" – and

> this being the case, the two propositions that underlie the EPA's action – that (1) it must, under the [ESA], consult concerning transfers of CWA permitting authority, but (2) it is not permitted, as a matter of law, to take into account the impact on listed species in making the transfer decision – cannot both be true. Because the agency's decisionmaking was based on contradictory views of the same words in the same statutory provision, the ultimate decision was not the result of reasoned decisionmaking.

NAHB App. 26-27. While it was unnecessary for the court of appeals to go beyond this rationale for remanding to EPA, the court also explained that EPA's position that it

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[8] *See* EPA's Court of Appeals' Answering Brief, at 31 n.9; *see also* J.A. 321-22, 325. Because EPA had recognized that it *was* required to comply with section 7(a)(2) and respondents' sole concern was with the adequacy of that compliance, respondents, while never conceding that the CWA transfer criteria were satisfied, did not base their challenge on them.

was under no obligation to address the actual effects of its transfer decision was contrary to the language of section 7(a)(2), that provision's legislative history and patent purpose, and *Hill*. The court, however, did not hold that EPA could not approve the transfer but, rather, remanded the matter for a "more careful consideration of the actual protection" that would be afforded by other federal and state measures following transfer. *Id.* at 61.

SUMMARY OF ARGUMENT

1. EPA now agrees that the court of appeals correctly ruled that EPA's approach to section 7(a)(2) reflected an internally inconsistent interpretation of the meaning and function of the provision. Therefore, in accordance with established principles of administrative law, the case should be remanded to EPA for further proceedings, notwithstanding EPA's extra-record *post hoc* effort to "clarif[y]" its position for the first time in this Court. EPA Br. at 49.

2. Should the Court nevertheless address whether section 7(a)(2) applies in this context, petitioners' position that section 7(a)(2) has no bearing on NPDES transfer decisions contradicts the plain language of the ESA, which provides that EPA must "insure that *any action authorized, funded, or carried out*" by EPA is "not likely to jeopardize the continued existence of species or result in the destruction or adverse modification" of critical habitat. 16 U.S.C. § 1536(a)(2) (emphasis added). In *Hill*, this Court ruled that "[o]ne would be hard pressed to find a statutory provision whose terms were any plainer." 437 U.S. at 173. Those "terms" apply squarely to EPA's "final action authorizing

Arizona to implement the NPDES program," 67 Fed. Reg. 79,631, as well as to EPA's expenditure of federal funds on the program. Petitioners' position also flies in the face of Congress's response to *Hill*, which ratified this Court's plain language reading while also creating an exemption process for the specific purpose of *resolving* any intractable conflicts between section 7(a)(2) and agency actions under other statutes. Thus, in sharp contrast to the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.* ("NEPA") – which imposes "only procedural requirements on federal agencies," *Department of Transportation v. Public Citizen*, 541 U.S. 752, 756-57 (2004) – section 7 contains a "flat ban" on agency actions likely to result in jeopardy to listed species or the "destruction of critical habitats," *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313-14 (1982), and also sets forth a Congressionally-mandated process for resolving any conflicts between that "ban" and agency actions under other statutes.

3. Petitioners' arguments are predicated on the demonstrably erroneous premise that it is impossible for EPA to comply with *both* section 7(a)(2) and section 402(b)(1) of the CWA, and hence that the agencies (and the Court) must, in effect, choose sides in a battle of statutory commands. However, as EPA and FWS have announced to the public, the "CWA and ESA [are] compatible and complementary" statutes that "contain powerful tools that, when integrated effectively, will advance the objectives of both Acts." NAHB App. 267, 274. Accordingly, as demonstrated by EPA's and FWS's past *successful* efforts at compliance with *both* laws – in which State applications were approved *and* sensible steps were taken to safeguard federally protected species – the federal agencies' real-world

experience belies any need to read these statues as being in unavoidable conflict.

4. On close inspection, petitioners are actually asking the Court to create a gaping loophole in section 7(a)(2) that bears no relationship to the words or extinction prevention purpose of the provision. Thus, if the Court were to rule that section 7(a)(2) does not apply simply because Congress established criteria for EPA to apply in making transfer decisions (criteria that in fact encompass a consideration of wildlife concerns) section 7(a)(2) will be gutted, because Congress *generally* legislates by delineating the factors that agencies consider in making decisions. But as *Hill* makes crystal-clear, section 7(a)(2) was enacted so that agencies would *also* be required to address endangered species impacts before taking action. If petitioners believe that is bad public policy, their proper recourse is with Congress, rather than asking this Court to rewrite section 7(a)(2).

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY HELD THAT EPA'S DECISION WAS ARBITRARY AND CAPRICIOUS AND THE CASE SHOULD BE REMANDED ON THAT BASIS

A. EPA Now Concedes That Its Approach To Section 7(a)(2) Was Internally Inconsistent And Confusing

EPA now agrees that the court of appeals was "correct" in ruling that EPA's decision was based on inconsistent interpretations of section 7(a)(2):

> *[T]he court of appeals was correct in stating that the no-jeopardy and consultation requirements of Section 7(a)(2) go hand in hand, and that Section 7(a)(2) does not require federal agencies to consult about conduct to which the no-jeopardy mandate does not apply.* The court was also correct that the course of agency proceedings in this case reflected a *degree of confusion* regarding the ESA's application to the NPDES transfer decision.

EPA Br. at 42 (emphasis added). Evidently, therefore, the government concurs with the court below that EPA's decision reflects an arbitrary, if not "nonsensical," view that EPA "had to consult but had no authority to do anything concerning the matter about which it had to consult." NAHB App. 25-26. Indeed, EPA goes so far as to characterize its own decision documents as being based on a "misstatement of law," EPA Br. at 45, a "misperception" and "erroneous view" of the meaning of section 7(a)(2), *id.* at 46, and a "failure . . . to appreciate the full logical implications" of the agency's position before the court below. *Id.* at 47.

Ordinarily, such concessions of legal "confusion" and internal inconsistency should result in the case being remanded to the agency for "reasoned decisionmaking." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52, 56-57 (1983) ("*State Farm*"). As the Court has explained:

> [i]f the record before the agency does not support the agency action, if the agency has not considered all relevant factors, or *if the reviewing court simply cannot evaluate the challenged action on the basis of the record before it, the proper course, except in rare circumstances, is to remand to the*

> *agency for additional investigation or explanation.*

Florida Power & Light Corp. v. Lorion, 470 U.S. 729, 744 (1985) (emphasis added); *see also SEC v. Chenery*, 332 U.S. 194, 196-97 (1947) ("If the administrative action is to be tested by the basis on which it purports to rest, that basis must be set forth with such clarity as to be understandable.").[9]

B. EPA Cannot Avoid A Remand Based On Its Extra-Record *Post Hoc* Explanation

Here, petitioners present "no special circumstances," *Gonzales v. Thomas*, 547 U.S. 183, 126 S. Ct. 1613, 1615 (2006), that justify deviating from what the government acknowledges are "established principles" of administrative law. EPA Br. at 48 n.17. To the contrary, EPA seeks to sidestep these principles by resorting to the kinds of "'*post*

[9] As noted earlier, the record reflects not only a now-conceded incongruity in EPA's view on the applicability of section 7(a)(2) as a whole, but also a related inconsistency in the Biological Opinion concerning how the "effects" of an action should be analyzed once section 7(a)(2) *is* triggered. The Opinion says that FWS uses a "but for" test in assessing such effects, NAHB App. 112, and that statement is consistent with other explanations of the Service's longstanding approach. *See* 51 Fed. Reg. 19,926, 19,932 (June 3, 1986) (preamble to ESA regulations). But the Opinion then applies a different "*legal* cause" analysis, EPA Br. at 25 (emphasis added), to avoid evaluating all of the actual impacts on endangered species. This discordance affords an additional basis on which the case should be remanded on arbitrary and capricious grounds. *See, e.g., New England Coalition on Nuclear Pollution v. NRC*, 727 F.2d 1127, 1130 (D.C. Cir. 1984) (Scalia, J.) (where an agency may choose between two approaches to a problem, the agency cannot say it is "adopt[ing] one and [then] apply the other. To do so is the essence of arbitrary and capricious action.") (internal quotation omitted).

hoc rationalizations'" the Court has long held "to be an inadequate basis for review" of agency action. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 419-20 (1971) (quoting *Burlington Truck Lines v. U.S.*, 371 U.S. 156, 168-69 (1962)).

EPA contends that the Court need not remand because the "federal agencies have since" – *i.e.*, "since" the agency decision under review was made – "clarified their understanding of the legal principles that govern in this setting." EPA Br. at 42. This "clarification" – which is actually a *reversal* of the agencies' prior policy – is that section 7(a)(2) compliance is "not required in this context." *Id.* at 49. The government acknowledges that this newly-minted argument conflicts with EPA's declarations in connection with past NPDES transfer decisions that section 7(a)(2) compliance *is* mandatory, as well as with EPA's published positions "[a]t both the beginning and the end of the consideration of Arizona's transfer application." *Id.* at 6, 44. Nonetheless, EPA maintains that because it has now provided *this* Court with the "very clarification that *might have occurred* if the court of appeals had . . . remanded for further administrative proceedings," the Court should decide the case based on EPA's new "understanding" of its statutory duties. *Id.* at 49 (emphasis added).

The Court should decline this invitation to dispense with fundamental principles of administrative law and appellate review. EPA's purported "clarification" took place not only long after EPA decided to transfer authority to Arizona, but many months after the court of appeals issued its ruling based on the administrative record. Indeed, the agency's revised position – as embodied in an October 2006 unpublished "exchange of letters," EPA Br.

at 37-38 – was hastily developed during the time that EPA was asking this Court for extensions of time to file its petition for certiorari. *See* EPA's 9/26/06 Application for a Further Extension of Time, at 5. Plainly, having lost below – including on the now-conceded ground that its approach to section 7(a)(2) was internally inconsistent – EPA set out to manufacture a *new* "clarified" position that the agency now seeks to substitute in this Court for the admittedly "confus[ing]" rationale invoked in the administrative proceeding and presented to the court of appeals. EPA Br. at 42.

There are good reasons, however, why this Court has ruled that such *post hoc* explanations "cannot serve as a sufficient predicate for agency action." *American Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 539 (1981). They are

> incompatible with the orderly functioning of the process of judicial review. This is not to deprecate, but to vindicate the administrative process, for the purpose of the rule is to avoid 'propel(ling) the court into the domain which Congress has set aside exclusively for the administrative agency.'

Burlington Truck Lines, 371 U.S. at 168, 169 (internal citation omitted).

This interest in protecting the "orderly functioning of the process of judicial review," *id.*, is at its zenith in this case because the letters on which EPA is now relying were not available to either the court of appeals or the parties in the court below. In other words, EPA has compounded its administrative law violation by *also* disregarding this Court's directive that the Court ordinarily refrains from even considering facts and materials that are "not part of

the record" compiled in the court below "[b]ecause this Court must affirm or reverse upon the case as it appears in the record. . . ." *Witters v. Washington Dep't of Services for the Blind*, 474 U.S. 481, 488 n.5 (1986); *see also Wygant v. Jackson Board of Education*, 476 U.S. 267, 278 n.5 (1986).[10]

C. EPA's "Harmless Error" Argument Is Baseless

1. EPA also argues that a remand is unnecessary because "'[i]n administrative law . . . there is a harmless

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[10] EPA's reliance on *Auer v. Robbins*, 519 U.S. 452, 461 (1997), for the novel proposition that the Court should not only consider but "defer" to the agency's *post hoc* explanation, EPA Br. at 38, is misplaced. In *Auer*, the Court did not consider a challenge to an agency action but, rather, resolved litigation between two private parties that turned in part on the meaning of a regulation previously issued by the Department of Labor. Accordingly, the Court requested the Secretary of Labor to file an *amicus* brief explaining how the agency's regulations applied to the case. *Auer*, 519 U.S. at 461. In relying on the interpretation it had requested, the Court explained that, under the "circumstances of this case," the "Secretary's position *is in no sense* a '*post hoc* rationalizatio[n]' advanced by an agency *seeking to defend past agency action against attack*." *Id.* at 462 (internal quotation omitted; emphasis added). Here, in contrast, the rapid-fire "exchange of letters" that was evidently engineered for the purpose of bolstering EPA's position in this Court constitutes the quintessential *post hoc* effort to "defend past agency action against attack." *See* EPA App. 93a-110a (indicating that EPA sent letters on October 13, 2006, and received nearly identical responses from FWS and the National Marine Fisheries Service *four and five days later*, and that these responses were received less than one week before EPA filed its petition for certiorari). In this connection, it is also noteworthy that the Alaska application the letters purport to address has not even been noticed for public comment in the Federal Register because the application was deemed seriously deficient by EPA on various grounds. *See* http://www.dec.state.ak.us/water/npdes/pdfs/WG_mtg_13_Handout_5.pdf.

error rule,'" EPA Br. at 45 (quoting *PDK Labs., Inc. v. United States DEA*, 362 F.3d 786, 799 (D.C. Cir. 2004)), and "[r]espondents [] were not prejudiced by EPA's erroneous view that the consultation was required by Section 7(a)(2)." EPA Br. at 46. Petitioners made no such "harmless error" argument in the court of appeals, and hence it should be deemed waived. *See, e.g.*, *Hormel v. Helvering*, 312 U.S. 522, 556 (1941). But even if the Court entertains this new argument, respondents have in fact been severely "prejudiced" by EPA's shifting, inconsistent positions on its section 7(a)(2) responsibilities, as well as by its belated attempt to clarify its position for the first time in this Court.

In addition to the patent unfairness of putting respondents in the position of having to address in this Court a "clarified" explanation that was not raised in either the administrative process or the court below, EPA is effectively nullifying respondents' rights to participate in *administrative proceedings* concerning Arizona's application, and particularly respondents' rights *under EPA's own regulations* to comment on NPDES transfer applications. *See* 40 C.F.R. § 123.61(b). Because EPA, both in past published pronouncements and in soliciting comments on Arizona's transfer application, declared that EPA *is* required to comply with section 7(a)(2), EPA Br. at 44, under established administrative law principles the agency's revised understanding of its legal obligations should *at least* be exposed to public comment *before* being adopted and subjected to judicial review. *See, e.g.*, *Alaska Professional Hunters Ass'n v. FAA*, 177 F.3d 1030, 1034 (D.C. Cir. 1999) ("Once an agency gives its regulations an interpretation, it can only change that interpretation as it would formally modify the regulation itself: through the process

of notice and comment rulemaking.") (internal quotation omitted).

2. Moreover, this is hardly a case in which further agency proceedings – including EPA entertaining public comment on its modified position – would be a pointless exercise. Rather, as might be expected from a hurried, litigation-driven "clarification," the "exchange of letters" avoids important issues that could – and should – be addressed by EPA in the first instance through remanded administrative proceedings. The agency's consideration of these issues may persuade it to adopt a different approach and would at least result in a more complete record for judicial review.

For example, as noted, EPA not only "authori[zed]" and "approved" Arizona's application, NAHB App. 69, 76, but, at Arizona's request, EPA also committed substantial federal *funds* to the Arizona NPDES program. *See* J.A. 53 ("EPA has committed to funding [the Arizona program] for the next three years"). While FWS maintained that EPA's funding of the State program was an *independent* basis for triggering section 7(a)(2) duties, *see* 16 U.S.C. § 1536(a)(2), this issue was largely of academic significance in view of EPA's concession that consultation was required by *authorization* alone. *See* J.A. 44 (EPA disagreed that it must consult on "funding" of Arizona's program but conceded an obligation to consult on "delegation of the program").

However, in view of the agencies' "clarified" position that EPA's "authorization" was insufficient to require compliance with section 7(a)(2), EPA's funding of Arizona's program becomes a far more crucial consideration, because section 7(a)(2) applies to "any action . . . funded" by a federal agency. 16 U.S.C. § 1536(a)(2). At the very least,

given EPA's belated reversal of its longstanding position that program authorization alone is an adequate basis for section 7(a)(2) compliance, a remand should at least address whether, in the agencies' view, authorization *along with* federal funding is sufficient to trigger full section 7(a)(2) compliance.

3. Another issue that respondents (if afforded the opportunity) would urge EPA to address on remand is how EPA reconciles its revised position regarding section 7(a)(2) with the manner in which the agency has dealt with *other* overarching legal obligations imposed on federal agencies but not enumerated in the transfer provision. Thus, EPA's *post hoc* position is that section 7(a)(2) should be ignored because "[n]one of the nine criteria contemplate or provide for consideration of potential effects to listed species [or] critical habitat." EPA App. 97a. In reality, as previously explained, the CWA criteria *do* "provide for consideration" of wildlife impacts and, indeed, the Biological Opinion recognizes that the CWA's "specific references to protecting 'fish,' 'shellfish,' 'wildlife,' and 'aquatic life' . . . clearly encompass federally listed and proposed species." NAHB App. 84.

Even aside from this conflict between EPA's *post hoc* position and the Biological Opinion actually before the Court, EPA's new explanation raises the important question of whether the agency is acting consistently with *other* statutory and legal obligations with far less of a relationship to the transfer criteria than federally protected wildlife. *See Nat'l Cable and Telecomm. Ass'n v. Brand X Internet Services*, 545 U.S. 967, 981 (2005) (agency's "[u]nexplained inconsistency" may afford a basis for "holding an interpretation to be an arbitrary and capricious change from agency practice"). For example,

when announcing its decision on the Arizona application, EPA explained that the National Historic Preservation Act, 16 U.S.C. § 470(f) ("NHPA"), "requires Federal agencies to take into account the effects of their undertakings on historic properties." NAHB App. 73. Although such "effects" are not mentioned in the CWA transfer criteria, EPA explained that it had complied with the "coordination process" required by the NHPA. *Id.* at 74. Similarly, in responding to comments submitted by the Inter-Tribal Council of Arizona, EPA stated that, "consistent with the federal trust responsibility" towards Native-American tribes, EPA would take steps, post-transfer, to address "matters that arise under the [Arizona] program which may affect Tribes, including issues related to permits that may have a potential adverse effect on tribal historic properties." J.A. 203. EPA did not suggest that it could disregard the "trust responsibility" towards Native-Americans because it is not enumerated in the CWA.

As now "clarified" therefore, EPA's anomalous position appears to be that section 7(a)(2) is the *only* legal obligation imposed on the federal government that EPA should ignore in making NPDES transfer decisions – although Congress intended to "afford[] endangered species the highest of priorities. . . ." *Hill*, 437 U.S. at 194. At the very least, respondents are indeed "prejudiced by the absence of an opportunity" even to *raise* in remanded administrative proceedings these and other significant issues implicated by EPA's conceded confusion concerning section 7(a)(2) and the agency's extra-record effort to cure that problem in this Court. *Gerber v. Norton*, 294 F.3d 173, 184 (D.C. Cir. 2002).

In sum, because EPA's decision was based on inconsistent views of section 7(a)(2), the case should have been

remanded for further administrative proceedings, and it was unnecessary for the court below to address the broader statutory construction issue. *See, e.g., Air Courier Conference of Am. v. Am. Postal Workers Union*, 498 U.S. 517, 531-32 (1991) (Stevens, J., concurring) ("Faithful adherence to the doctrine of judicial restraint provides a fully adequate justification for deciding this case on the best and narrowest ground available."); *PDK Labs.* 362 F.3d at 799 (Roberts, J., concurring in the judgment) (applying the "cardinal principle of judicial restraint" that "if it is not necessary to decide more, it is necessary not to decide more").

II. IN MAKING TRANSFER DECISIONS, EPA MUST COMPLY WITH SECTION 7(a)(2)

Because EPA now concedes that the court of appeals was correct in ruling that the consultation and substantive requirements of section 7(a)(2) "go hand in hand," EPA Br. at 42, respondents and EPA agree that EPA must either comply with that provision in its entirety or not at all. *See id.* EPA's "clarified" answer is not at all. As the agency recognizes, the "logical" implication of its argument is that a transfer to a State could be *certain* to lead to extinction of one or more federally protected species, and yet neither the procedural nor substantive safeguards of section 7(a)(2) would ever come into play. EPA Br. at 14, 42, 47. Here, for example, although the transfer could, without further safeguards, prove "devastating" to survival of the few remaining Southwestern willow flycatchers, J.A. 39, or lead to the "severe decline" of endangered plants, *id.* at 49, petitioners' position is that the agencies need not consult about such dire impacts or do anything to prevent them even if simple solutions are at hand.

This is not a "logical" or even a plausible reading of section 7(a)(2). EPA Br. at 47. To the contrary, adopting petitioners' approach would require the Court to engage in "interpretive acrobatics," *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471, 482 (1999), and cast aside both plain statutory language and the "institutionalized caution" that Congress intended when federal agencies take actions that affect listed species. *Hill*, 437 U.S. at 194.

A. Compliance With Section 7(a)(2) Is Required By The Plain Language Of Section 7(a)(2), This Court's Ruling In *Hill*, And Congress's Subsequent Ratification Of That Ruling

In view of the "text and structure" of section 7, *Gonzales v. Oregon*, 546 U.S. 243, 126 S. Ct. 904, 910 (2006), *Hill*'s reading of that provision, and Congress's subsequent creation of the Endangered Species Committee to address conflicts, petitioners' contention that the ESA has no bearing on NPDES transfer decisions is simply untenable.[11]

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[11] Since "traditional tools of statutory construction" establish that EPA must comply with section 7(a)(2), there is no need for the Court to determine whether the unusual circumstances of this case warrant any deference to the agencies' inconsistent approach to the provision. *Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 843 n.9 (1984). In any event, even if it were appropriate to consider the extra-record letters, those documents would be entitled to little if any deference. *See United States v. Mead Corp.*, 533 U.S. 218, 228 (2001) (amount of deference based on "the degree of the agency's care, its consistency, formality," and related factors); *Christensen v. Harris County*, 529 U.S. 576, 587 (2000) (denying *Chevron* deference to agency opinion letter).

1. Plain Language Of Section 7(a)(2)

While EPA asserts that section 7(a)(2) does not "unambiguously" apply, EPA Br. at 20, petitioners largely ignore the provision's plain language, which fits this case perfectly. Section 7(a)(2) provides, in pertinent part, that:

> *[e]ach federal agency shall*, in consultation with and with the assistance of the Secretary, insure that *any action authorized, funded, or carried out by such agency* [] is not likely to jeopardize the continued existence of any endangered species or threatened species or *result in* the destruction or adverse modification of [critical] habitat of such species. . . .

16 U.S.C. § 1536(a)(2) (emphasis added).

EPA is a "federal agency" and its self-described decision "*authorizing* Arizona to implement the NPDES program" surely falls within the "*any action authorized* . . . by such agency" language. *See Dep't of Hous. and Urban Dev. v. Rucker*, 535 U.S. 125, 131 (2002) ("the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind' ") (internal citation omitted); Webster's New World Dictionary (1990) ("authorize" means "to give official approval to" and "to give power or authority to"); *see also Bennett*, 520 U.S. at 164-65 (phrase "any person may commence a civil suit" in the ESA's citizen suit provision is "an authorization of remarkable breadth" that should be taken "at face value").

Accordingly, if section 7(a)(2) is interpreted in accordance with its ordinary meaning, the provision "requires federal agencies to ensure that *none of their activities* . . . will jeopardize the continued existence of endangered species 'or result in the destruction or modification' " of

critical habitat. *Sweet Home*, 515 U.S. at 692 (emphasis added; internal citation omitted). In addition, because the Arizona program is receiving substantial federal funds and, indeed, the transfer would likely not have even occurred in the absence of such funding, *see* J.A. 200-01, the plain terms of section 7(a)(2) apply for that reason as well. *See also* 50 C.F.R. § 402.02 (defining "[a]ction" for purposes of section 7 as "all activities or programs of any kind *authorized, funded*, or carried out, *in whole or in part*, by Federal agencies") (emphasis added).[12]

2. Statutory Context

The "specific context in which that language [of section 7(a)(2)] is used," *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997), makes even clearer that section 7(a)(2) means what it says, because *another* subsection contains the very limitation petitioners are asking this Court to read *into* section 7(a)(2). Thus, section 7(a)(1) of the statute separately provides that

> federal agencies shall, in consultation with and with the assistance of the Secretary, *utilize their authorities* in furtherance of the purposes of this

[12] That petitioners' position distorts the statutory language is also illustrated by EPA's assertion that, "by its own terms, Section 7(a)(2) directs agencies to 'insure' only that their *own* actions are not likely to be the cause of jeopardy." EPA Br. at 27 n.8 (emphasis in original). That approach reads federally "authorized" and "funded" activities out of the provision, and also overlooks the fact that section 7 expressly refers to federal actions involving a "permit or license applicant." 16 U.S.C. § 1536(b)(1)(B); *see also* NAHB App. 75 (explaining that EPA has "long considered a determination to approve or deny a State" NPDES transfer request to be a "license" decision that is the product of an "adjudication").

> chapter by *carrying out programs for the conservation* of endangered species and threatened species.

16 U.S.C. § 1536(a)(1) (emphasis added).

Hence, section 7(a)(1) imposes an *affirmative* obligation on federal agencies to implement "programs for the *conservation*" – *i.e.*, recovery, *see* 16 U.S.C. § 1532(3) – of listed species, but *that* obligation is expressly limited to agencies' use of their *own* "authorities." In contrast, the section 7(a)(2) *prohibitions* on jeopardy and critical habitat destruction apply to "*any* . . . action authorized, funded, or carried out" by an agency. In other words, section 7(a)(1) creates a more far-reaching "conservation" duty but does so with regard to a narrower range of agency conduct.

When these subsections are viewed together, petitioners' contention that section 7(a)(2) is implicated only by "federal agencies' exercise of existing discretionary authority," EPA Br. at 15, runs roughshod over well-entrenched rules of statutory construction. First, "'[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" *Russello v. United States*, 464 U.S. 16, 23 (1983) (internal citation omitted) (affording statutory phrase its broad plain language meaning because a "succeeding subsection" had the same limitation the Court was being asked to read into the provision at issue; "[h]ad Congress intended to restrict" the provision in the same manner, it "presumably would have done so expressly as it did in the immediately following subsection"). Therefore, the short answer to petitioners' overarching contention that section 7(a)(2) should, in effect, be judicially rewritten to say that agencies need

only "utilize their authorities" to avoid jeopardy or critical habitat destruction, *see* EPA Br. at 15, is that Congress knew how to, but simply "did not write the statute that way." *Russello*, 464 U.S. at 23.[13]

By arguing that the prohibitions in section 7(a)(2) apply only to an agency's use of its "existing authority," EPA Br. at 15, rather than "any [agency] action authorized, funded, or carried out," as Congress mandated, petitioners' approach also contravenes the "'cardinal principle of statutory construction . . . [that] [i]t is [the Court's] duty to give effect, if possible, to every clause and word of a statute. . . .'" *Bennett*, 520 U.S. at 173 (internal citation omitted). This is because the section 7(a)(1) duty to "conserve" listed species necessarily *subsumes* the substantive prohibitions embodied in section 7(a)(2), *i.e.*, an agency cannot "conserve" a listed species while *also* causing its extinction. *See Sierra Club v. U.S. Fish and Wildlife Service*, 245 F.3d 434, 441-42 (5th Cir. 2001)

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[13] Petitioners assert that legislative history counsels in favor of inserting into section 7(a)(2) the "utilize their authorities" limitation that Congress omitted. EPA Br. at 15. Even if the Court were free to "read[] words or elements into [section 7(a)(2)] that do not appear on its face," *Bates v. United States*, 522 U.S. 23, 29 (1997), the legislative history actually reflects, as the decision below explains, that the broad scope of the jeopardy prohibition "was, as one would expect, deliberate." NAHB App. 34. Thus, Congress specifically intended to impose a "*further* require[ment]" on agency "action[s]" that goes beyond agencies' duty to "*use their authorities* in order to carry out programs" for the recovery of endangered species. 1973 House Report, ESA Leg. Hist. at 153 (emphasis added); *see also* 51 Fed. Reg. 19,926, 19,934 (FWS explanation that section 7(a)(1) "authorize[s] Federal agencies to factor endangered species conservation *into their planning processes*," and that "[i]n contrast, section 7(a)(2) *contains the mandatory 'jeopardy' standard*" and the "ultimate barrier past which *Federal actions may not proceed*" without an exemption from the Endangered Species Committee) (emphasis added).

("'[c]onservation' is a much broader concept than mere survival"). As a consequence, unless section 7(a)(2) is read to apply to "any [federal] action authorized, funded, or carried out" – as Congress said – the provision is mere "surplusage." *Sweet Home*, 515 U.S. at 698 ("unless the statutory term 'harm' [in the ESA] encompasses indirect as well as direct injuries, the word has no meaning that does not duplicate the meaning of other words that § 3 uses to define 'take'").

3. *TVA v. Hill*

While petitioners assert that *Hill* "had no occasion to address the question presented here," EPA Br. at 16, the federal agency in *Hill* advanced essentially the same arguments being made by EPA, albeit in a different factual context, and the Court's reasons for rejecting those arguments apply with full force here.

In *Hill*, the agency argued that the section 7 jeopardy prohibition did not apply to a dam that had already cost "more than $ 100 million dollars" in public funds, was "near completion" when the ESA was enacted, 437 U.S. at 172, 174, 184, and for which Congress had intentionally "continued appropriations . . . with full awareness of the [endangered species] problem" posed by the action. *Id.* at 166. Indeed, Congress had specifically appropriated funds "for completion" of the dam and "relocation of the snail darter," the endangered species at issue. *Id.* at 171.

In that factual context, TVA argued that the phrase "actions authorized, funded, or carried out" should not be afforded its plain meaning but, rather, should be limited to only those actions "with respect to which the agency *has reasonable decision-making alternatives before it*." Pet. Br

at 26, *Tennessee Valley Authority v. Hill*, No. 76-1701 (filed Jan. 26, 1978) ("TVA Br.") (emphasis added); *see also id.* ("the 'actions' referred to are not all the actions that an agency can ever take, but rather actions that the agency *is deciding whether* to authorize, to fund, or to carry out") (emphasis added). Therefore, TVA urged the Court to reject an "over-literal construction" of section 7. *Id.* at 29, 39.[14]

While the dissent endorsed the view that the jeopardy prohibition should apply only to actions an "agency is *deciding whether* to authorize, to fund, or to carry out," 437 U.S. at 205 (Powell, J.) (emphasis in original), Chief Justice Burger's majority opinion held that this reading of the statute was contrary to the "ordinary meaning of [the] plain language," which the Court construed as "command[ing] federal agencies" not to take actions that in fact result in jeopardy to species or destruction of critical habitat. *Id.* at 173; *see also id.* at 188 ("[i]n fact, there are no exemptions in the [jeopardy prohibition] for federal agencies"). The Court also found this "ordinary meaning" consistent with the legislative history, particularly the fact

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[14] EPA's asserted distinction between this case and *Hill* – that *Hill* dealt with "agency policy judgments concerning the appropriate exercise of *discretionary* authority," EPA Br. at 16 (emphasis in original) – misstates both cases. In making NPDES transfer decisions, EPA *has* "discretionary authority" under the CWA, particularly with regard to wildlife-related impacts. *See supra* at 8-9. Moreover, the government's position in *Hill* was that TVA did *not* have "decision-making alternatives" because of Congress's "determination that this project should be completed" and the dam was nearly complete. TVA Br. at 29, 36. In that connection, any notion that TVA had some inherent "discretion" to refuse to spend funds that Congress had appropriated for completion of the dam is mistaken. *See Train v. New York City*, 420 U.S. 35, 43-45 (1975) (federal agencies lack discretion to avoid spending appropriated funds on policy grounds).

that the bills crafted by Congress were designed to both "*prohibit* [a] federal agency from taking action which does jeopardize the status of endangered species" and "furthermore," to direct each agency to "utilize [its] authorities for carrying out programs" for the conservation of listed species. *Hill*, 437 U.S. at 179-80 (emphasis in original; internal quotation omitted). Accordingly, the Court's ruling confirms that it has been clear from the beginning of the Act that the jeopardy prohibition applies, as the plain language provides, to all "action[s]" authorized, funded, or carried out by an agency and *not* simply to agencies' decisions on how to use their own "authorities."

Indeed, the Court further explained that the ESA's predecessor statutes "qualified the obligation of federal agencies by stating that they should seek to preserve endangered species only 'insofar as is practicable and consistent with the[ir] primary purposes,'" *Hill*, 437 U.S. at 181 (internal citation omitted), and that it was "very significant" that, as enacted, the ESA "carefully omitted all of the[se] reservations" and deleted "all phrases which might have qualified an agency's responsibilities" to avoid actions that result in extinction. *Id.* at 182. Accordingly, the Court ruled that Congress's decision to adopt "stringent, mandatory" language, *id.* at 183, reflected "an explicit congressional design to require agencies to afford first priority to the declared national policy of saving endangered species," and that the "pointed omission of the type of qualifying language previously included in endangered species legislation reveals a conscious decision by Congress to give *endangered species priority over the 'primary missions' of federal agencies.*" *Id.* at 185 (emphasis added). *Hill*, therefore, clearly stands for the proposition that agencies cannot escape the section 7(a)(2

prohibitions merely by arguing that Congress assigned them conflicting responsibilities. *See also id.* at 184 ("'[T]he agencies of Government can no longer plead that they can do nothing about it. *They can, and they must. The law is clear.*'") (emphasis in original) (quoting 119 Cong. Rec. 42913 (1973) (Rep. Dingell)).

4. Congress's Ratification Of *Hill* And Creation Of The Endangered Species Committee To Resolve Conflicts Between Section 7(a)(2) And Other Statutory Duties

In the 1978 amendments, Congress took two steps that are also fatal to petitioners' position. First, Congress ratified *Hill's* plain language ruling regarding the scope of the section 7 prohibition on jeopardy and destruction of critical habitat. Second, Congress created the Endangered Species Committee for the precise purpose of resolving the kind of conflict that petitioners (erroneously) insist exists between section 7(a)(2) and the CWA transfer provision.

As explained in the 1978 House Report, Congress understood the ruling in *Hill* as "indicat[ing] that the pointed omission of any type of qualifying language in [section 7 of] the statute revealed congressional intent to give the continued existence of endangered species priority over the primary missions of Federal agencies." 1978 House Report, ESA Leg. Hist. at 734. The Report further explained that Congress accepted this construction of section 7 as "requir[ing] all federal agencies to consult with the Department of the Interior . . . when *any* of their actions *may* affect endangered species," and that "whether a particular activity violates Section 7 depends on the *type and degree of impact that the activity will have* on the species or its habitat." *Id.* at 735 (emphasis added). Accordingly,

rather than respond to *Hill* by qualifying the jeopardy prohibition with the kind of limiting language in section 7(a)(1), Congress reenacted the prohibition without any such restriction. *See* Pub. L. 95-632, 92 Stat. 3753, ESA Leg. Hist. at 648.

Instead, to "introduce some flexibility into the Act," Congress enacted "a procedure through which Federal agencies *may be considered for an exemption from the Act's mandate* that they not jeopardize the continued existence" of listed species. 1978 House Report, ESA Leg. Hist. at 727 (emphasis added). Accordingly, the "basic premise" of Congress's response to *Hill* was that "the integrity of the interagency consultation process designated under section 7 of the Act be preserved," and that only "in those instances where the consultation process has been exhausted *and a conflict still exists,*" the Endangered Species Committee shall consider granting an exemption for a federal action. 1982 Senate Report, NAHB App. 532 (emphasis added).

Contrary to petitioners' assertion that the exemption process is somehow foreclosed when there are "legal constraints on agency power to protect species," EPA Br. at 29, Congress specifically anticipated that the Committee would address conflicts between section 7(a)(2) and the agency's "jurisdiction" to protect species under its own authorities. *See* 1978 House Report, ESA Leg. Hist. at 746 (the Committee "should focus on a wider variety of alternatives [than the consultation process]. *Their search should not be limited to original project alternatives or the acting agency's jurisdiction.*") (emphasis added). Further, in granting an exemption, the Committee – which, once again, is composed of high-ranking federal officials as well as a representative of each "affected State" – is authorized

to establish such "mitigation and enhancement measures . . . as are necessary and appropriate to minimize the adverse effects of the agency action" on listed species irrespective of whether such measures are within the action agency's statutory authority. 16 U.S.C. §§ 1536(e)(1)(3), (h)(1)(B).

Accordingly, this is the paradigmatic case in which a "'judicial interpretation[] settled the meaning of an existing statutory provision,'" and Congress then manifested its "'intent to incorporate'" that interpretation into the statutory scheme. *Merrill Lynch, Pierce, Fenner & Smith v. Dabit*, 547 U.S. 71, 126 S. Ct. 1503, 1513 (2006) (internal citation omitted). Moreover, application of that principle is "particularly apt here," *id.*, because Congress created a specific process for addressing any irreconcilable conflicts between section 7(a)(2) and agency actions under other statutory schemes.

B. Petitioners' Remaining Arguments Are Baseless

1. Petitioners argue that section 7(a)(2) does not "impliedly repeal[]" the CWA's transfer provision. EPA Br. at 19. As EPA acknowledges, however, "'[w]hen two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.'" *Id.* at 20 (quoting *Morton v. Mancari*, 417 U.S. 535, 551 (1974)); *see also Watt v. Alaska*, 451 U.S. 259, 266-67 (1981) (courts should adopt interpretations that "give effect to each" law "while preserving their sense and purpose").

Petitioners' approach makes no genuine effort to "give effect to each" of the laws at issue. To the contrary, particularly as now "clarified," EPA's position is that the Court should hold that, although the plain terms of section 7(a)(2) surely apply to EPA's "final action[s] authorizing" State NPDES programs, NAHB App. 76, EPA may nevertheless disregard section 7(a)(2)'s consultation requirement *and* substantive prohibitions. That argument obliterates, rather than gives effect to, the language and purpose of section 7(a)(2).

There is no legal or practical justification for decimating section 7(a)(2) in this manner. Rather, the most straightforward way of giving effect to *both* the ESA and CWA – which EPA and FWS have previously recognized as "compatible and complementary" statutory schemes, NAHB App. 274, with "consistent" wildlife "protection goals," *id.* at 84 – is to do what the agencies *successfully* did for many years before their reversal of position: use the section 7 consultation process to devise reasonable methods for ameliorating post-transfer impacts on federally listed species of concern to Service biologists. Petitioners proffer no reason why this common-sense approach, which has already furthered the objectives of both statutes, cannot also work here or with regard to any other applications.[15]

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[15] Indeed, in *Hill* the Court observed that Congress "foresaw that § 7 would, on occasion, require agencies to alter" actions unrelated to environmental protection objectives. *Hill*, 437 U.S. at 186-87 (citing as an example "Air Force practice bombing" activities that were affecting whooping cranes). Accordingly, it makes no sense for EPA to contend that it must disregard the provision when acting under a "complementary" conservation statute. NAHB App. 274; *see also* 16 U.S.C. § 1531(c) (declaring the "policy of Congress that Federal agencies shall cooperate

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However, even if FWS were ultimately to conclude that transfer to Arizona (or another State) would in fact result in jeopardy or destruction of critical habitat and that EPA cannot remedy the problem consistent with its CWA duties that would *still* not necessitate an "implied repeal" analysis. Thus, *Congress* itself has established the legal mechanism for "giving effect" to both statutes under such circumstances by providing that EPA and/or the State may invoke the Endangered Species Committee exemption process.[16]

2. Also misplaced is petitioners' reliance on a FWS regulation that provides that "section 7 . . . appl[ies] to all actions in which there is *discretionary Federal involvement* or control." 50 C.F.R. § 402.03 (emphasis added). The simple answer is that EPA repeatedly stated in the court below that it did *not* rely on that regulation in making its decision. *See supra* at n.8; *see also* NAHB App. 43 n.19. EPA cannot now contend that the Court should sustain the transfer decision on the basis of a regulation that the agency conceded had nothing to do with its action under review. *See Chenery*, 332 U.S. at 196 (courts "must judge

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with State and local agencies to resolve water resource issues *in concert with conservation of endangered species*") (emphasis added).

[16] Although the ESA and CWA can and should be harmonized, even if they were found to conflict unavoidably, the correct result would not be for the Court simply to disregard section 7(a)(2), as petitioners insist. Rather, since the "text of Section 7(a)(2) unambiguously" *does* apply in this context, EPA Br. at 20, it should be given effect as the "latter act" passed by Congress. *Posadas v. National City Bank of New York*, 296 U.S. 497, 503 (1936). By the same token, there is nothing to prevent Congress from specifically excluding any agency action from ESA requirements, as Congress has done on several occasions. *See, e.g., Mount Graham Coalition v. Thomas*, 89 F.3d 554 (9th Cir. 1996) (applying rider exempting telescope project from section 7(a)(2)).

the propriety of [agency] action solely by the grounds invoked by the agency").[17]

But even if the Court were to consider this new rationale, the regulation has no bearing on this case. The regulation cannot "be applied to alter the clearly expressed intent of Congress" in section 7(a)(2), *Board of Governors of the Federal Reserve System v. Dimension Financial Corp.*, 474 U.S. 361, 368 (1986) and, in any event, EPA *does* have "discretionary . . . involvement or control," 50 C.F.R. § 402.03, particularly with regard to the consideration of wildlife impacts, both before and after NPDES transfer decisions are made. *See supra* at 8-9. Indeed, this Court has observed that EPA has "broad authority to oversee state [NPDES] programs," *Arkansas*, 503 U.S. at 105, and EPA itself has recognized that its "authority to disapprove an inadequate state program based upon [its] informed judgment *necessarily demonstrates discretionary EPA control*." EPA Fifth Cir. Br. at 34 (emphasis added). Even further, EPA is required to solicit and consider public comment on transfer applications and thus, as the agency has pointed out, "[i]f EPA were simply acting in a ministerial fashion, such weighing of the merits of public comments would not be necessary." *Id.*

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[17] That the intervenors cited the regulation "in arguing that . . . Section 7(a)(2) was inapplicable" to the transfer decision, EPA Br. at 38 n.13, is of no legal moment because it is a bedrock principle of administrative law that an "agency's action must be upheld, if at all, on the basis *articulated by the agency itself*" at that time of its decision. *State Farm*, 463 U.S at 50 (emphasis added). Moreover, even NAHB suggests that it *was* appropriate for EPA and FWS to have consulted with regard to any "water-quality related impacts on listed species or critical habitat." NAHB Br. at 48.

Certainly, the mere fact that the transfer provision has the word "shall" in it does not mean that EPA lacks discretion in making decisions. *See, e.g., Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 66 (2004) (statute providing that an agency "shall" prevent unnecessary or undue degradation of certain lands and resources "is mandatory as to the object to be achieved, but it leaves [the agency] with a great deal of discretion in deciding how to achieve it"). Accordingly, when EPA loosely characterizes the transfer provision as a Congressional "mandat[e]," EPA Br. at 25, it is apparently arguing that whenever Congress circumscribes an agency's exercise of discretion by delineating factors for an agency to consider in making a decision (as Congress generally does), but does not expressly include consideration of endangered species impacts, then the section 7(a)(2) requirements cease to apply. But that approach, once again, eviscerates section 7(a)(2) in a way that cannot possibly be supported by its plain language; indeed, it resurrects the very construction of section 7 that was rejected in *Hill*, *i.e.*, that federal agencies need only avoid jeopardizing species to the extent "consistent with the[ir] primary purposes." 437 U.S. at 181 (internal citation omitted).

3. Petitioners argue that *Department of Transportation v. Public Citizen*, *supra*, supports the proposition that "[s]ection 7(a)(2) applies only to conduct that is attributable to the federal agency itself" and that, if species go extinct as a result of EPA's transfer decision, that is the fault of Congress, not the agency. EPA Br. at 14. That, of course, is only a different way of saying that EPA's authorization of the Arizona program is not the kind of agency action that triggers section 7(a)(2) – a position that has no support in the language of the statute and that

recapitulates the central argument rejected in *Hill*, in which TVA likewise argued that it was Congress's decision to fund the dam, and hence the ESA should be ignored. 437 U.S. at 171.

In any case, the reasoning in *Public Citizen* supports the proposition that EPA is required to comply with the substantive mandate of section 7(a)(2), including by consulting with FWS on all of the *actual* effects of the transfer decision. *Public Citizen* concerned whether the Federal Motor Carrier Safety Administration ("FMCSA") had complied with NEPA, which, as explained by the Court, "imposes *only procedural requirements* on federal agencies with a particular focus on requiring agencies to undertake analyses of the environmental impact of their proposals and actions." 541 U.S. at 756-57 (emphasis added). FMCSA had prepared an Environmental Assessment evaluating the environmental effects of its regulations establishing safety standards for trucks. *Id.* at 760-62. Accordingly, the only issue was whether the agency's NEPA analysis was deficient because it failed to address adequately the impacts associated with an "action of the President" – who is not required to comply with NEPA – to lift a moratorium on Mexican trucks entering the United States. *Id.* at 769.

Focusing on the language and purpose of NEPA, the Court held that where an agency "has no authority" to take environmental impacts into account in making a particular decision, then it "serve[s] 'no purpose' in light of NEPA's regulatory scheme as a whole" to require an agency to prepare a NEPA document thoroughly analyzing those impacts. *Id.* at 767 (internal citation omitted). The Court reasoned that in view of NEPA's purely procedural requirements, impacts that could have no bearing on the

agency's decision were not "legally relevant" to the NEPA analysis. *Id.* at 770.

Here, however, petitioners are advancing a far more extreme position with respect to a fundamentally different statutory obligation. Thus, although section 7(a)(2) prohibits "any" agency action that is likely to jeopardize the continued existence of a species, and "contains a *flat ban* on the destruction of critical habitats," *Weinberger v. Romero-Barcelo*, 456 U.S. at 314 (emphasis added), petitioners contend that EPA's authorizing action is not subject to section 7(a)(2) *at all*. Moreover, as *Hill* itself noted, NEPA decisions are "completely inapposite" in the ESA context because NEPA "imposes a procedural requirement on agencies," but the "ESA is substantive in effect, designed to *prevent* the loss of any endangered species. . . ." *Hill*, 437 U.S. at 188 n.34 (emphasis in original).

Accordingly, as the Court further explained in *Hill*, while "it would make sense to hold NEPA inapplicable" in situations where an agency may not actually take any action based on its NEPA analysis, "[s]ection 7, on the other hand, compels agencies not only to *consider* the effect" of their actions on endangered species, "but to take such actions as are necessary to *insure* that species are not extirpated as a result of federal activities." *Id.* (emphasis in original); *see also* 1978 House Report, ESA Leg. Hist. at 743 ("each Federal agency is required to insure that any action authorized, funded, or carried out by it *does not result in* species or habitat degradation unless the action has been exempted" by the Endangered Species Committee) (emphasis added). Thus, to apply *Public Citizen* in this context would be to force a square precedential peg into a round statutory hole.

CONCLUSION

The judgment of the court of appeals should be affirmed insofar as it was based on the inconsistency in EPA's approach to section 7(a)(2) and the case should be remanded for further administrative proceedings.

Respectfully submitted,

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